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No. 82-270

In the Supreme Court of the United States

October Term, 1982

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Non-Party "Petitioner",

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, and CHARLIE GREENE,

Co-Petitioners-"Respondents",

vs.

ELBERT ERKINS, SAMUEL DENSON, and PERRY CULPEPPER,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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COUNTER-STATEMENT OF THE ONLY QUESTION PRESENTED

Whether a writ of certiorari should be granted to review a Court of Appeals' decision that the "union membership" and "good cause" prerequisites for suit under §501(b) of the Landrum-Griffin Act are satisfied by a variety of factual variables indicating both membership status and good cause to proceed as of the time of commencement of the §501(b) suit, where the Court of Appeals' decision presents no issues of public importance to the administration of the federal courts or the Nation's unions, no inter-circuit conflicts, and no final holding on the as yet untried facts of the case?

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The respondents Elbert Erkins, Samuel Denson, and Perry Culpepper oppose the petitioners' request for the issuance of a writ of certiorari in this case. The Court will notice that the respondents have re-captioned and re-alligned the parties in this case, because it is duplicitous of the United Steelworkers of America to caption themselves as the petitioner, without indicating to the Court their non-party status; and, it is equally duplicitous to allign and caption the losing defendants below, Billy Bryan, Arthur Comer, George Bullard, and Charlie Greene as respondents, when in fact they are parties in

interest opposed below, antagonistic to the outcome below, and supportive of the petition before this Court.

The respondents Elbert Erkins, Samuel Denson, and Perry Culpepper adopt the non-party petitioner's and the respondents' statements of the Opinions Below, Jurisdiction, and Statutes Involved.

COUNTER-STATEMENT OF THE CASE

The statement of the case presented by the United Steelworkers of America is factually misleading and based upon a number of facts which are in dispute on the record in this case. Footnote one (1) at page three (3) of the petition is incorrect The supplemental statement of the case by the petitioners-"respondents" Bryan, Comer, Bullard, and Greene presents matter completely outside the record and irrelevant to the question of whether or not a writ of certiorari should be granted.

Respondents Erkins, Denson, and Culpepper adopt the factual statement of the opinion of the Eleventh Circuit Court of Appeals as the statement of the case and supplement it as follows. In the United States District Court for the Middle District of Alabama the respondents Erkins, Denson, and Culpepper were plaintiffs, and the respondents Bryan, Comer, Bullard, and Greene were defendants. The plaintiffs, who were local union members, claimed that the defendants, who were local union officials, had misappropriated strike funds for their own personal use during a long and bitter strike between the local union and the employer of the employees who constituted the membership of the local union. Under §501 (b) of the Landrum-Griffin Act it is necessary to the commencement of a suit claiming that union officials have breached their fiduciary duties for the plaintiffs to

show to the Court, prior to the commencement of the suit, that they are union members, that they have made an attempt to get the union to redress the alleged fiduciary breach, that the attempt has not resulted in the initiation of corrective litigation by the union, and that there is "good cause" to proceed in the case. These prerequisites were initially met in this suit by the plaintiffs. Then, the Steelworkers attempted to intervene and persuade the trial court that it should not have issued and should thus rescind leave to proceed to the plaintiffs. The trial court did *not* grant the Steelworkers leave to intervene but did decide on its own motion to rescind its prior issuance of leave to proceed. Thereafter, the trial court denied reconsideration of that rescission decision to the plaintiffs.

Plaintiffs appealed to the Eleventh Circuit Court of Appeals. The Steelworkers did not seek intervention before the Eleventh Circuit Court of Appeals. That court reversed the trial court's decision and remanded the case with leave to proceed to the plaintiffs.

Thus, as this case comes to this Court, the Steelworkers are not actually a party to this litigation, and the so-called "respondents" Bryan, Comer, Bullard, and Greene are actually parties petitioners in this Court. Because there has been obvious coordination between counsel for Bryan, Comer, Bullard, and Greene and counsel for the Steelworkers[1] in this litigation, this Court can fairly conclude that the captioning and allignment of the parties constitutes a conscious attempt to deceive the Court and to create the false appearance that both a petitioner and

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[1] Indeed, in both the trial court and the appellate court plaintiffs sought to disqualify respondents' counsel for the conflict between their individual representation and prior representation of the local union.

some seemingly adversarial respondents join in this proposition that the writ of certiorari should be granted.

Respecting the crucial issue of the membership status of Erkins, Denson, and Culpepper at the time of the commencement of the action, in addition to the facts set forth in the opinion of the Court of Appeals, the following *undisputed* facts should be noted. Erkins, Denson, and Culpepper were members in good standing of both the Steelworkers and the local throughout the duration of the strike between December, 1976 and July, 1978. Decertification of a local union as bargaining representative has no effect at all upon the continued existence of the local union; it means only that certified bargaining representatives status from the government is lost. When the union was decertified the Steelworkers put the local under the control of an administrator for purposes of "winding up" its affairs, presumably because it was a single-bargaining unit local union. The local union, however, has never finally been wound up, and its existence and chartering are still in effect. Neither Erkins, nor Denson, nor Culpepper has ever voluntarily withdrawn from the union's membership nor been suspended nor expelled from the union's membership. Each remains fully within the Steelworker's constitutional definition of eligibility for membership. There has been no termination of the union either pursuant to the procedures established under the Landrum-Griffin Act with the United States Department of Labor or pursuant to internal union procedures with the Steelworkers. Indeed, the local union treasury reflects a continuing balance of approximately $2,000.00, and the continued existence of bank accounts from which the misappropriations occurred. While it is true that Erkins, Denson, and Culpepper have not paid union dues since October, 1978, that fact stated alone is

misleading, because Erkins, Denson, and Culpepper have not been obligated to pay dues, by virtue of the application of the out-of-work waiver of dues provisions of the Steelworkers' constitution. Moreover, Erkins, Denson and Culpepper as employees retain recall rights with the employer, as well as transfer rights within the union. Thus, should they be recalled, or should they obtain employment with another employer that recognizes a local union affiliated with the Steelworkers, then their active dues' obligation would immediately, without more, recur. It is on the basis of all of these facts, together with the facts stated in its opinion, that the Eleventh Circuit Court of Appeals concluded that Erkins, Denson, and Culpepper made a sufficient showing of local union membership at the time of the initiation of the §501(b) suit to warrant the issuance of leave to proceed.[2]

The petition also misrepresents the facts respecting the decisions of both the trial court and the Court of Appeals that Erkins, Denson, and Culpepper had sufficiently demonstrated their attempts to persuade the union to initiate corrective litigation and good cause for viola-

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[2] The Court of Appeals also applied the standards of *Horner v. Ferron*, 362 F.2d 224 (9th Cir. 1966) to conclude that disputed facts material to an issue of whether the §501(b) prerequisites had been met were sufficient to satisfy leave to proceed requirements and take the dispute to trial. The application of that standard reveals numerous inferences that presently could be drawn on the issue of "membership". An ongoing boycott of the employer could be successful, thereby eventuating a revival of the local union; the local is inactive since decertification but is available for reactivation due to organizing efforts at the employer or elsewhere; both strike funds and local union passback funds continue to exist in local union accounts currently under the administrator's control; the local union still has obligations, not yet paid, and financial affairs not yet wound-up; some members of the local have been recalled to work at the employer, and the local could be reactivated.

tion to warrant the issuance of leave to proceed. Steelworkers would have this Court believe that it was motivated by cost-benefit concerns and proper administrative referral attitudes towards the United States Department of Labor in its decision not to proceed to litigate the misappropriations. The fact is that Steelworkers used its internal audit procedures and the referral to the United States Department of Labor as a mechanism for denying full access to the facts to Erkins, Denson, and Culpepper and their counsel and as a further means for denying full adversarial discovery and trial litigation of the embarrassing facts of the misappropriations and of the subsequent participation of Steelworker officials in "stonewalling" the true facts. To this day there has been no full adversarial hearing of the actual facts of the misappropriation.[3]

REASONS FOR NOT GRANTING THE WRIT

On the basis of the foregoing Statement of the Case, the seeming abstract importance of the issues presented by the Steelworkers' petition is belied. On the basis of the full and actual facts of the case, the "membership" and "good cause" questions become ordinary §501(b) procedural questions based on facts that have not yet been tried; and the "Article III standing" question disappears.

However, before we discuss these legal matters, we first consider the insignificance of the issues presented in light of the actual facts of record. The petition has

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[3] In the criminal litigation against Bryan, Comer, Bullard, and Greene, remarked in their brief, Steelworker officials, including accounting and audit officials, appeared as witnesses for Bryan, Comer, Bullard, and Greene, thereby virtually assuring their acquittal.

ex cathedra opined that the definition of membership in this case substantially burdens all unions as well as the case load of the federal courts. Neither proposition is true. The constitutional definitions of eligibility for membership and limitations upon membership in various unions affiliated with the AFL-CIO are as varied as are the politics and identities of the unions so affiliated. The interplay between the statutory definition of membership under the Landrum-Griffin Act and the constitutional membership provisions of various unions will always differ from case to case depending upon the facts of each case, the constitutional provisions involved, the substantive Landrum-Griffin rights being asserted, and the membership provisions of the Act. It is to construct a strawman for the Steelworkers to contend that the highly factual construction of "membership" in the instant case constitutes a *per-se* rule respecting all membership in all unions for all purposes. Moreover, in order to construct the strawman, the Steelworkers have also assumed that full statutory "due process" provisions must be applied in order administratively, as an intra-union matter, to accomplish a suspension or termination of membership for non-disciplinary reasons such as final termination of local union existence and bargaining status. No case so holds. For these reasons, the Steelworkers' contentions respecting the practical impact of the decision below upon the administration of labor unions are illusory.

The Steelworkers' petition also contends that the "membership" determination below will greatly burden the federal district courts in their statutory obligations respecting the fiduciary duties of union officials. However, the balance struck by Congress respecting the tension between union members' access to the federal courts and union officials' duties to be honest is a balance that under

§501(b) vests substantial discretion in federal district court judges as to whether or not to grant leave to proceed. Indeed, the door to federal court is more closely guarded by §501(b) than it is in any other ordinary kind of federal district court civil litigation. Thus, there is no undue burden upon the federal courts by virtue of the decisions of either the Eleventh Circuit or the trial court.

The Steelworkers' petition argues for a certain construction of the membership definitional provisions of the Landrum-Griffin Act, so that fulfillment of the requirements for membership in a labor organization is a functional category based on intra-union constitutional membership status at the time of commencement of the litigation. On the basis of the actual facts of record in this case, whether any court prefers the Steelworkers' construction of the Act is irrelevant, because Erkins, Denson, and Culpepper have satisfied even the Steelworkers' requirements for membership. To phrase it differently, the court below did *not* premise its decision on a purely temporal reading of the statute but rather upon all of the factual variables demonstrating membership on this record. Indeed, the reason that this case is actually a mine-run case respecting the statutory meaning of "membership" is because virtually every federal court that has considered "membership" has followed the approach of examining all factual and union constitutional variables respecting membership and then deciding each case on its own particular facts. See, e.g., *Alvey* vs. *General Electric Company*, 622 F.2d 1279 (7th Cir. 1980); *Hughes* v. *Local Eleven International Association of Bridge Workers*, 287 F.2d 810 (3rd Cir. 1960); *Basilicato* v. *International Alliance*, 479 F.Supp. 1232 (Dist. Conn. 1979); *Axelrod* v. *Stoltz*, 264 F.Supp. 536 (E.D. Pa. 1967).

On the question of "good cause", the actual state of the record indicates that the district court made a "good cause" determination upon the basis of the sworn statements before it, as well as supporting evidence, declined to reconsider that determination, and was upheld by the Court of Appeals. The Steelworkers have consistently taken the view that, because the §501(b) procedure is designed to benefit the union by returning funds to it, "good cause" should not be found where the supposed benefit is resisted by the union. This argument confounds the very nature of derivative enforcement litigation. If the Steelworkers had initiated litigation to obtain damages or an accounting for the misappropriations in question, then there would be no basis for the §501(b) leave to proceed suit. However, Congress has determined, and the courts below concur, that where the union resists the request for damages or an accounting, and where there is good cause to proceed, then the derivative litigation may be commenced. Good cause here was satisfactorily demonstrated on the facts presented in the opinion of both the district court and the Court of Appeals. Thus, the "good cause" aspect of the Court of Appeals' opinion also presents only a mine-run decision, as to which virtually all the lower federal courts concur. *Dinko v. Wall,* 53 F.2d 68 (2nd Cir. 1976); *Purcell v. Keane,* 406 F.2d 1195 (3rd Cir. 1969); *Horner v. Ferron,* 362 F.2d 224 (9th Cir. 1966); *Brink v. Da Lesio,* 453 F.Supp. 272 (M.D. Md. 1978); *Pawlak v. Greenawalt,* 464 F.Supp. 1265 (M.D. Pa. 1979). Whether the lower courts in this case abused their discretion in concluding "good cause" is a question which this court does not ordinarily review. This is especially so where the facts upon which the good cause determination are based have not yet matured or been tested by the full adversarial process at the trial

court level or refined by appellate litigation on a fully developed record before reaching this Court.

The decision below is not inconsistent in principal with the decision of the Third Circuit in *Purcell v. Keane*, 406 F.2d 1195 (3rd Cir. 1969), because that court considered all factors in determining "good cause" precisely as did both the district court and the Court of Appeals in the instant case.[4]

Finally, no inter-Circuit conflict is presented by either of the issues raised by the Steelworkers' petition. Indeed, the entire fabric of the case law in the lower federal courts is harmonious with the decision of the Eleventh Circuit.

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[4] The so-called Article III issue of standing is obviated by the facts respecting membership. Obviously, a member who is such at the time of suit possesses the requisite personal stake *as a member* because the remedy sought benefits him *as a member* by restoring the misappropriated funds to the treasury of the union of which he is a member. That he receives no money personally is irrelevant. *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *United States v. SCRAP*, 412 U.S. 669 (1973).

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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